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**SECRETARY, BOARD OF
OIL, GAS & MINING**

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**BEFORE THE BOARD OF OIL, GAS AND MINING
DEPARTMENT OF NATURAL RESOURCES
STATE OF UTAH**

UTAH CHAPTER OF THE SIERRA CLUB,
et al, Petitioners,

vs.

UTAH DIVISION OF OIL, GAS & MINING,
Respondents,

ALTON COAL DEVELOPMENT, LLC, and
KANE COUNTY, UTAH

Respondent/Intervenors.

**PERMITTEE'S SECOND MEMORANDUM
IN OPPOSITION TO PETITIONERS'
MOTION FOR INTRODUCTION OF
DEPOSITION TRANSCRIPTS AND
POSTPONEMENT OF POST-HEARING
BRIEFING SCHEDULE**

Docket No. 2009-019

Cause No. C/025/0005

Alton Coal Development, LLC (“**Alton**” or “Permittee”), supplements its first memorandum in opposition filed on May 11, 2010, and further objects to Petitioners’ Use of “Excerpts” taken from Rule 30(b)(6) Deposition Transcripts Regarding Air Quality and Cultural

Resources. As explained below, the Board should not admit the depositions into evidence because Petitioners' use of the deposition transcripts only duplicates live testimony received by the Board from the same witnesses at Hearing on April 29 and 30, 2010. In the alternative, Alton requests that the Board make explicit findings on the record regarding the probative value of the transcripts, and identify the portions relied on by the Board in reaching its decision on the merits.

ARGUMENT

I. THE DEPOSITION EVIDENCE OFFERED BY PETITIONERS SHOULD BE EXCLUDED BECAUSE IT DUPLICATES LIVE TESTIMONY FROM THE SAME WITNESSES ON THE SAME SUBJECTS

Under the Utah Administrative Procedures Act ("UAPA") this Board is to "regulate the course of the hearing to obtain full disclosure of all relevant facts" Utah Code § 63G-4-206(1)(a) (LexisNexis 2009). The Utah Rules of Evidence serve as "appropriate guides" to the extent they are applicable and not inconsistent with the Board's rules of practice. Utah Admin. Code R641-108-200 (2009). UAPA, the Utah Rules of Evidence, and the Board's rules all provide that the Board may exclude evidence that is unduly repetitious or needlessly cumulative. See Utah Code § 63G-4-206(1)(b)(i) ("unduly repetitious"); R641-108-201 ("unduly repetitious"); Utah R. Evid. 403 ("needless presentation of cumulative evidence").

In the present matter, Petitioners have asked the Board to receive into evidence the complete deposition testimony of four witnesses (Priscilla Burton, Chris McCourt, Joe Helfrich, and Jody Patterson) and a substantial portion of the testimony of a fifth witness (Daron Haddock), some 113 transcript pages in all. In Petitioner's post hearing brief on these same issues, they have relied upon three portions of two witnesses' testimony appearing on only five

pages of the transcript. Petitioners’ Post-Hearing Brief Addressing Air Quality and Cultural/Historic Issues, Bd. of Oil, Gas & Mining Docket No. 2009-019 (May 12, 2010). No explanation has ever been provided for how the Board should make use of the remaining 109 pages that Petitioners propose to “dump” into the record of this proceeding.

In each of the three instances, the deposition transcript duplicates testimony offered by the same witness when testifying before the Board. In the excerpts below, the cited deposition testimony appears on the left, and the parallel live hearing testimony on the right.

Quoted Deposition Testimony	Live Hearing Testimony
PRISCILLA BURTON	
<p>Q. Do you have experience in evaluating monitoring protocol for fugitive dust?</p> <p>A. No, I don’t. And that’s my point in the finding.</p> <p>Q. So will it be, then, the division of air quality that evaluates the effectiveness of the fugitive dust control plan, including the monitoring protocol?</p> <p>A. Yes, I hope that that is the case.”</p> <p>Pet. Br. at 3, quoting Dep. Tr. at 78.</p>	<p>Q. You testified that you did not have—you personally did not have the expertise to evaluate the effectiveness of the monitoring included as part of ACD’s final dust control plan. Is that correct?</p> <p>A. That’s correct.</p> <p>...</p> <p>Q. Do you agree that the Division of Oil, Gas and Mining was looking to the Division of Air Quality and relying on the Division of Air Quality to evaluate the effectiveness of Fugitive Dust Control Plan that ACD had submitted?</p> <p>A. No, not the Fugitive Dust Control Plan. Not to—well, I did an evaluation of the Fugitive dust Control Plan to the best of my ability. I felt that I could not pass judgment on the method of analysis or method of measuring opacity, because that was—because I’m not an air quality engineer and I don’t have that kind</p>

	<p>of training; furthermore, our inspectors don't have that kind of training.</p> <p>And it appeared to me that Wyoming had worked out a good arrangement with their air quality office to utilize their expertise for similar situations, and that the Division should also do so based on the MOU that they had signed with the Department of Environmental Quality.</p> <p>Hrg. Tr. 121:14–123:17 (Apr. 29, 2010).</p>
<p>Q: In your professional opinion as an environmental scientist at the division, is there a connection, is there a relation that the fugitive dust has related to the clarity of the night skies?</p> <p>A. They both would affect the clarity of the night skies, fugitive dust and lighting.”</p> <p>Pet. Br. at 9, quoting Dep. Tr. at 82-83.</p>	<p>Q. So let me repeat that question, which was: In your opinion, as a soil scientist, can fugitive dust from the Coal Hollow mine site affect visibility outside the permit area?</p> <p>A. Well, it could, and that why there's a dust control plan.</p> <p>Hrg. Tr. 115:4-9</p> <p>(At the hearing, the extent of Ms. Burton's opinion on this subject was further explored and significantly qualified at 113:24-117:21 (Apr. 29, 2010)).</p>
JODY PATTERSON	
<p>Q. Did Montgomery Archeological Consultants make an evaluation of the effect of the Coal Hollow Mine as proposed in the permit application to the Division on any historic resources that are completely outside the permit area?</p> <p>A: No.</p> <p>Pet. Br. at 13-14, quoting Dep. Tr. at 25-26.</p>	<p>Q. Okay. So, just to be clear, the inventory is just about the sites that are out there and identifying those sites. Is that correct?</p> <p>A. Yes. There's a little bit more to it, but that's the main purpose of it.</p> <p>Q. It doesn't actually get into addressing any of the effects or impacts?</p> <p>A. In some regards they do. We make recommendations that the agencies—reviewing agencies can either agree with or not agree with. We typically do that because we are the</p>

	<p>eyes on the ground.</p> <p>Hrg. Tr. 103:20–104:5 (Apr. 30, 2010). (Mr. Patterson elaborated on the timing and extent of his analysis of effects on archaeological sites at 103:24-104:25; 108:21-109:5.)</p>
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In each instance, the deposition testimony adds nothing to the testimony offered live at the Hearing. In fact, each instance shows that the live testimony is more detailed than the deposition excerpts provided by Petitioners, and adds important detail on direct and cross-examination. Therefore, admission of the deposition testimony, at least the portions cited, at best merely duplicates evidence adduced at the hearing. In certain respects, the testimony presented at Hearing presents better evidence in that the Board, as well as the parties, participated in the witness examination. Alton respectfully suggests that the Board exercise its authority under UAPA and its own rules and exclude the proffered depositions because they are unduly repetitious and unnecessarily cumulative.

II. IF THE BOARD ADMITS THE DEPOSITION TRANSCRIPTS, IT SHOULD MAKE CLEAR FINDINGS REGARDING THEIR ROLE AND VALUE IN THE DECISION ON THE PERMIT

Alton recognizes in this formal administrative adjudication that the admissibility of evidence is a matter within the Board’s sound discretion. If the Board’s findings of fact are subject to judicial review, the Utah Supreme Court must determine whether the Board’s findings are “unsupported by substantial evidence in the record.” Utah Code § 40-10-30(3)(f). In doing so, the Court will examine the entire record to determine whether sufficient evidence exists to

support the Board's conclusion, but the appellate court will not reweigh the evidence. See Larson Limestone Co. v. Div'n of Oil, Gas & Mining, 903 P.2d 429, 430 (Utah 1995). Because Petitioners now seek to "load up" the record with over 100 pages of deposition transcript, while supporting indications of its probative value in only 3 instances, the Board should find, in writing, what role, if any, the remaining pages played in the final determination on these claims. Alton therefore respectfully requests that the Board state, on the record, the degree to which the deposition transcript affects any particular finding of fact. In that regard, as explained above, Alton suggests that the live hearing testimony was more informative and persuasive than the corresponding deposition transcripts of testimony from the same witnesses and allowed the Board the opportunity to examine the witness. Therefore, any findings of fact should indicate that the deposition transcripts, ultimately, were of little probative value in determining the Division compliance with cultural resource and air quality regulations affecting the permit.

CONCLUSION

Having now seen the use that Petitioners seek to make of the proffered deposition transcripts, Alton moves that the Board exercise its discretionary authority to exclude evidence that is unnecessarily duplicative or cumulative. As demonstrated, the deposition testimony cited by Petitioners provides a poorer, less detailed account of the same facts and issues addressed at Hearing by the same witnesses. Further, the Board did not participate in the examination of witnesses during the depositions. In the event the Board admits the deposition transcripts as proffered, for any finding of fact dealing with these issues, Alton requests that the Board find in writing that the now-proffered deposition testimony was of significantly less probative value than the corresponding live testimony.

Respectfully submitted this 17th day of May, 2010.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing PERMITTEE'S SECOND MEMORANDUM IN OPPOSITION TO PETITIONERS' MOTION FOR INTRODUCTION OF DEPOSITION TRANSCRIPTS AND POSTPONEMENT OF POST-HEARING BRIEFING SCHEDULE was sent via email and U.S. Mail, postage prepaid, this 17th day of May, 2010, to the following:

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A handwritten signature in blue ink, reading "Julie McKenna", is written over a horizontal line.